No. 10-1029

IN THE

Supreme Court of the United States

ROBERT MARTINEZ, et al.,

Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

ETHAN P. SCHULMAN
Counsel of Record
TRINA D. MCALISTER
CROWELL & MORING LLP
275 Battery Street,
23rd Fl.
San Francisco, CA 94111
(415) 986-2800
eschulman@crowell.com

CHARLES F. ROBINSON
KAREN J. PETRULAKIS
MARGARET WU
UNIVERSITY OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
1111 Franklin Street,
8th Fl.
Oakland, CA 94607-5200
(510) 987-9800

Counsel for Respondents The Regents of the University of California and Mark G. Yudof

CHRISTINE HELWICK
ANDREA M. GUNN
CALIFORNIA STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
401 Golden Shore,
4th Floor
Long Beach, CA 90802-4210
(562) 951-4500

Counsel for Respondents The Board of Trustees of the California State University and Charles B. Reed

235730

QUESTIONS PRESENTED

Whether California Education Code Section 68130.5, which exempts all students who have attended high school in California for three or more years and graduated from paying nonresident tuition at state public colleges and universities, is expressly preempted by 8 U.S.C. Section 1623 although it does not condition eligibility for the exemption on the basis of residence in California and nonresident U.S. citizens can and do qualify for the exemption without regard to residence.

Whether California Education Code Section 68130.5 is impliedly preempted by federal law although Congress expressly authorized states to make unlawful aliens eligible for postsecondary education benefits subject to certain conditions that are satisfied here.

DISCLOSURE STATEMENT

Respondent The Regents of the University of California is a government entity with neither a parent company nor any non-wholly-owned subsidiaries. Respondent Mark G. Yudof is the President of the University of California, and is named in his official capacity. Respondent The Board of Trustees of the California State University is also a government entity with neither a parent company nor any non-wholly-owned subsidiaries. Respondent Charles B. Reed is the Chancellor of the California State University, and is named in his official capacity.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. 1-37) is officially reported at 241 P.3d 855 (2010). The opinion of the California Court of Appeal, Third Appellate District (Pet. App. 38-109) is not published by virtue of the California Supreme Court's order granting review of that decision. CAL. R. CT. 8.1105(e)(1), 8.1115(a). The order of the California Superior Court, Yolo County (Pet. App. 110-123) is not published.

JURISDICTION

This Court lacks jurisdiction to consider the petition for certiorari because Petitioners lack Article III standing. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

California Education Code Section 68130.5

Notwithstanding any other provision of law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

8 U.S.C. § 1621

(a) Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not –

(1) A qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. § 1101 et seq.], or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. § 1182(d)(5)] for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

* * *

(c) (1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means –

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

* * *

(d) A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

8 U.S.C. § 1623

(a) Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

(b) This section shall apply to benefits provided on or after July 1, 1998.

STATEMENT OF THE CASE

A. California Education Code Section 68130.5.

Section 68130.5 of the California Education Code was enacted and signed into law in 2001. That state tuition law exempts certain students, including unlawful aliens who meet its requirements, from paying nonresident tuition in the state's public colleges and universities. Section 68130.5 does not condition eligibility for the exemption on a student's residence or citizenship status. Rather, *any* person who meets the statutory requirements—attendance at a California high school for three or more years and graduation—is eligible under the statute, without regard to that person's residence or immigration status. Nonresident students from states other than California who satisfy the statutory criteria can and do qualify for the tuition exemption.

Despite Petitioners' accusation (Pet. 4), the California Legislature did not deliberately "defy" federal law when

it enacted Section 68130.5. To the contrary, it carefully tailored that statute to comply with federal law.

The Petition contains an incomplete account of the pertinent facts. As Petitioners note (Pet. 5-6), in 2000, then-Governor Gray Davis vetoed an earlier version of the legislation. Pet. App. 15. However, the Petition fails to mention that following that veto, the legislation's author sought the opinion of California's Legislative Counsel, a nonpartisan official charged with advising the Legislature regarding the validity and constitutionality of proposed legislation. In a June 22, 2001 opinion letter, the Legislative Counsel concluded that AB 540, the legislation by which Section 68130.5 ultimately was enacted, would *not* conflict with Section 1623. *Id.*[1] The Legislature expressly relied upon that opinion in enacting AB 540, and Governor Davis then signed the legislation into law. In an uncodified section of the bill, the Legislature expressly found that "[t]his act . . . does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code." *Id.* Thus, as the California Supreme Court found, far from "defying" federal law, the Legislature carefully attempted to comply with federal law. *Id.* at 16, 23.

B. The Proceedings Below.

More than four years after the enactment of Section 68130.5, Petitioners filed a complaint in Yolo County Superior Court against Respondents The Regents of the University of California ("The Regents") and President

1. The California Supreme Court took judicial notice of that opinion, although it did not give it weight in its analysis. Pet. App. 15-16.

Mark G. Yudof, the California State University System and the California Community Colleges and their respective officials. Pet. App. 7.[2] Petitioners alleged they are United States citizens from states other than California who are or were students paying nonresident tuition at a California public university or college. *Id.* They sought to represent a class consisting of "thousands of former and current nonresident U.S. citizens." *Id.*

The complaint alleged that Section 68130.5 violates a number of federal and state statutes and constitutional provisions. *Id.* at 7-8. Petitioners sought a determination that Section 68130.5 was invalid, reimbursement of nonresident tuition fees, damages, and attorneys' fees. *Id.* at 8.[3]

Respondents demurred, contending that the complaint failed to state a cause of action. *Id.* The trial court sustained the demurrer without leave to amend and dismissed the action. *Id.* The court of appeal reversed the judgment in part. It held that Petitioners had forfeited the claim that they have a private right of action to enforce Section 1621 or Section 1623, and rejected Petitioners' arguments that Section 68130.5 conflicted with various

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2. By resolution, The Regents made Section 68130.5 applicable to the University of California. Pet. App. 11 n.1.

3. Petitioners' factual contentions regarding the number of unlawful aliens who purportedly benefit from the statutory exemption and the alleged cost of that provision to the State of California (Pet. 9 & n.7) are unsupported by the record. *See* Pet. App. 77 n. 19 ("We need not resolve factual disputes at this demurrer stage"). They are also irrelevant to the legal issues presented by this facial challenge.

state statutory and constitutional provisions. *Id.* However, the court of appeal held that Section 68130.5 is expressly preempted by both Sections 1621 and 1623, that it is also impliedly preempted, that Petitioners should be allowed leave to amend their equal protection claim,[4] and that the complaint stated a claim that Section 68130.5 violates the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 8-9.

All parties sought review by the California Supreme Court, which denied Petitioners' petition for review and granted Respondents' petitions for review. *Id.* at 9.

C. The California Supreme Court's Decision.

In a unanimous decision authored by Associate Justice Ming W. Chin, the California Supreme Court rejected Petitioners' primary challenge to Section 68130.5—that it confers eligibility on the basis of residence in California in violation of Section 1623. The court also concluded that Petitioners' remaining challenges to Section 68130.5 lack merit. Accordingly, it reversed the judgment of the court of appeal.

At the outset, the court observed that although the subject of persons unlawfully present in this country is a "controversial" one, "this court does not make policy." Pet. App. 5.[5] "Whether Congress's prohibition or the

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4. Petitioners later stipulated to dismiss that claim.

5. In an introductory aside, the court declined to employ either of the terms "undocumented immigrant" or "illegal alien" to refer to persons not lawfully in the country. Pet. App. 13-14. Rather, "[w]ishing to be as neutral, yet as accurate, as possible in

Legislature's exemption is good policy is not for us to say. Rather, we must decide the legal question of whether California's exemption violates Congress's prohibition or is otherwise invalid." *Id.* The court undertook that task "by employing settled methods of statutory construction." *Id.* at 5-6.

The court acknowledged that "[t]he power to regulate immigration is unquestionably exclusively a federal power." *Id.* at 12 (citations and internal quotations omitted). However, quoting this Court's seminal decision in *De Canas v. Bica*, 424 U.S. 351 (1976), it observed, "While the immigration power is exclusive, it does not follow that any and all state regulations touching on aliens are preempted." *Id.* The court declined to decide whether a presumption against preemption should apply, explaining that "[w]e need not resolve the question here because . . . we find no preemption even without a presumption." *Id.* at 13.[6]

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our terminology," the court used the term "unlawful alien," which was closest to the wording employed by the pertinent federal and state statutes. *Id.* at 14. We will follow the same convention here. We note, however, that this Court has employed the very term, "undocumented immigrant," to which Petitioners objected below. *E.g., Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (referring to "undocumented immigrants" and "undocumented workers").

6. For that reason, this Court should decline *amicus* Eagle Forum's invitation to decide that issue as well as others not presented in the Petition. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Further, *amici curiae* generally may not present additional questions for review. *Bell v. Wolfish*, 441 U.S. 520, 531-32 n.13 (1979).

The court first addressed Petitioners' main claim, that Section 68130.5 violates Section 1623, which states that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State. . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." In resolving that issue, the court considered "primarily section 1623's language." Pet. App. 16. Based on the plain statutory language, the court rejected Petitioners' claim. *Id.* at 17.

The court explained that the "fatal flaw" in Petitioners' argument is the contention that the statutory exemption from paying out-of-state tuition is "on the basis of residence within a State":

> It is not. It is based on *other* criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important here, that they have attended "[h]igh school . . . in California for three or more years."

Id. (quoting CAL. EDUC. CODE § 68130.5(a)(1), (2), & (4)). Thus, the exemption "cannot be deemed to be based on residence for the simple reason that many *nonresidents* may qualify for it." *Id.* at 18.

In particular, the court listed several categories of students who could have attended high school in California for at least three years and otherwise qualified for the

exemption yet not be California residents: students who live in an adjoining state or country and attend high school in California (citing CAL. EDUC. CODE §§ 48050, 48051); minor children of out-of-state parents who attend boarding schools in California; and students who attended high school in California for three years but then moved out of the state and lost their residency status. *Id.* at 18-19. Indeed, the court noted that "a majority of University of California students receiving the nonresident tuition exemption are in this country lawfully." *Id.* at 19.[7]

The court also rejected the court of appeal's reasoning that the statutory criteria establish "a surrogate criterion" for residence, again pointing to the wording of Section 1623:

> A residency requirement and the criteria stated in section 68130.5 share certain similarities, and those who satisfy section 68130.5 will often also be residents of California. But, as we have explained, section 68130.5's criteria are not the same as residence, nor are they a de facto or surrogate residency requirement. Congress specifically referred to *residence*—not some form of surrogate for residence—as the prohibited basis for granting unlawful aliens a postsecondary education benefit.

Id. at 19-20.

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7. Every year since 2002, "documented" students at the University of California (that is, U.S. citizens, legal permanent residents, and students with immigrant visas) have accounted for at least 70% of recipients of the exemption. Univ. of Calif. Ofc. of the President, *Annual Report on AB 540 Tuition Exemptions 2008-09 Academic Year*, 3, 7, 11 (Sept. 21, 2010), http://www.ucop.edu/sas/sfs/docs/ab540_annualrpt_2010.pdf (last visited Apr. 15, 2011).

The court rejected the argument that Section 1623 constitutes an absolute ban on unlawful aliens' receiving the exemption, reasoning that "[i]f Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition, it could easily have done so." *Id.* at 19. Construing Section 1623 as an absolute prohibition would read the phrase "on the basis of residence within a State" out of the statute. "The reference to the benefit being on the basis of residence must have some meaning. It can only qualify, and thus limit, the prohibition's reach." *Id.*

Finally, the court rejected Petitioners' reliance on the sparse legislative history of Section 1623, concluding it "does not reliably show that Congress intended to prohibit states entirely from exempting unlawful aliens from paying nonresident tuition." *Id.* at 22. The court noted that a conference committee report on a prior version of the legislation stated, "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." *Id.* at 21. However, the court found that one-sentence summary "oversimplifies more nuanced statutory language." *Id.* It "cannot change the circumstance that the actual statutory prohibition is not absolute, but qualified." *Id.* at 23. In short, "Section 1623's actual language prevails, not the committee report's." *Id.* The court also rejected Petitioners' reliance on floor statements by two individual legislators, observing that such views "carry little weight in interpreting the intent of the legislative body as a whole." *Id.*

Next, the court addressed Petitioners' argument that Section 68130.5 is expressly preempted by another federal statute, Section 1621. The first part of that statute proclaims "a general rule that unlawful aliens are not eligible for state or local public benefits." *Id.* at 25 (citing

8 U.S.C § 1621(a)). However, a second subparagraph of the statute (which Petitioners omit from their quotation of the statute, Pet. 2), states that "[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). The court had little trouble concluding that Section 68130.5 meets both statutory criteria: it was enacted in 2002; and subdivision (a)(4) of the state law expressly refers to "a person without lawful *immigration* status." *Id.* at 26.

The court also addressed and rejected Petitioners' claim that Section 68130.5 is impliedly preempted by federal law. *Id.* at 30-32. Pointing to Section 1621(d), which authorizes states to provide public benefits to unlawful aliens so long as they do so in compliance with the statute's requirements, the court concluded that "Congress did not intend to occupy the field fully." *Id.* at 31. "Because section 68130.5 complies with the conditions set out in both section 1621 and section 1623, those statutes cannot impliedly preempt it." *Id.*

Finally, the court rejected as unsupported by authority Petitioners' novel theory that Section 68130.5 violates the rights of nonresident students under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 34. Moreover, the court noted, the asserted basis for that claim is erroneous: Section 68130.5 "does not treat citizens worse than unlawful aliens. It grants the same exemption to *all* who qualify, whether they are non-resident citizens or resident unlawful aliens." *Id.* at 35.

REASONS FOR DENYING THE PETITION

As a threshold matter, this Court lacks jurisdiction to consider the petition for certiorari for the fundamental reason that Petitioners lack Article III standing. As nonresident students who do not qualify under Section 68130.5, Petitioners would not be eligible to pay resident tuition even if that statute were to be stricken. Moreover, they forfeited in the lower courts their claims under Section 1623 and 42 U.S.C. § 1983. As such, Petitioners do not have any cognizable and individualized injuries stemming from the implementation of Section 68130.5, and are unable to show that such injuries would be redressed by a decision in their favor. *See* Part I, *infra*.

Even if Petitioners could overcome this dispositive jurisdictional hurdle, neither of the issues they ask the Court to decide is actually presented by the California Supreme Court's unanimous and carefully reasoned decision.

Petitioners first assert that the Court should decide whether Section 68130.5 is expressly preempted by federal law because the California Legislature deliberately "defie[d] the congressional intent behind 8 U.S.C. § 1623. . . ." Pet. i. Petitioners repeat that extraordinary accusation throughout the Petition. *See id.* at 4, 7 (charging California with a "policy of calculated defiance" of federal law and accusing other states of having "circumvented federal law in this area with impunity"); *id.* at 24, 36 (accusing Legislature of "play[ing] semantic games to defeat the objectives of Congress"). But that heated rhetoric is belied by undisputed facts that Petitioners ignore in their Petition. Those facts, as the California Supreme Court

determined, support precisely the *opposite* conclusion: that when it enacted Section 68130.5, "the Legislature was aware of section 1623" (Pet. App. 15); that it is "clear" from the law's legislative history that the Legislature intended to act "in a way that does *not* violate section 1623" (*id.* at 23 (emphasis added); and that the Legislature expressly found that the law did *not* violate Section 1623. *Id.* at 15.

There is no conflict among the lower courts regarding the proper interpretation of Section 1623. The instant case is the first appellate decision to address a preemption challenge to similar state tuition laws, although such claims are pending before other courts. Petitioners' contention that the California Supreme Court's decision conflicts with a decision by a single federal district court is incorrect and does not present any basis for certiorari. *See* Part II(A), *infra*.

Petitioners' second question is also based on a false premise. Petitioners assert that the court below, having concluded that Section 68130.5 was not expressly preempted by federal law, "refus[ed] to consider" Petitioners' implied preemption claims. Pet. 28. That refusal, Petitioners contend, conflicts with precedents of this Court that require a reviewing court to engage in conflict preemption analysis even if it has found that the state law is not expressly preempted. *Id.* at 28-36. However, Petitioners are mistaken: far from "refusing" to consider their implied preemption claims, the California Supreme Court in fact *did* address those claims, and rejected them on their merits. That decision amounts to no more than a lower court's application of an accepted rule of law, which does not present any basis for review. SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted

'when the asserted error consists of . . . the misapplication of a properly stated rule of law"). *See* Part II(B), *infra*.

Petitioners' speculation that California or other states may enact legislation in the future that might violate Section 1623 does not present any colorable basis for review. *See* Part II(C), *infra*. Moreover, in the fifteen years since the federal statutes in question were enacted, the U.S. Department of Homeland Security, the federal agency responsible for enforcement of the federal immigration laws, has not taken any action or expressed any views on the issues raised here even though Petitioners' *amici* expressly urged it to do so. That is a clear indication that this Court's intervention is not required. *See* Part II(D), *infra*.

Finally, the court correctly rejected Petitioners' express and implied preemption claims. That result was compelled by the plain language of Section 1623 and is entirely consistent with this Court's precedents regarding the proper role of legislative history in statutory interpretation. *See* Part III, *infra*. The Petition should be denied.

I. PETITIONERS LACK STANDING TO INVOKE THIS COURT'S JURISDICTION.

At the threshold, the Court lacks jurisdiction over the Petition for the fundamental reason that Petitioners lack standing under Article III of the Constitution. The Court should deny certiorari on that ground, which is dispositive.

"To obtain a determination on the merits in federal court, parties seeking relief must show that they have

standing u .der Article III of the Constitution." *Arizona Christian Sch. Tuition Org. v. Winn*, Nos. 09-987, 09-991, 563 U.S. ___, 2011 WL 1225707, at *3 (Apr. 4, 2011). This jurisdictional requirement applies at every stage of a case, including a petition for certiorari to this Court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 611-12 (1989) (Court must determine "whether there is standing and an actual case or controversy that permits of a decision in federal court," even if the parties seek for the first time on certiorari to invoke the authority of the federal courts); *see generally* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 19.1(b) at 91 (9th ed. 2007).

While state courts are "not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc.*, 490 U.S. at 617; *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988). However, this Court may exercise its certiorari jurisdiction in such a case only if the petitioning party can show a "direct, specific, and concrete injury." *Id.* at 623-24. An "undifferentiated, generalized grievance about the conduct of government" is insufficient. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

Accordingly, "this Court has dismissed cases on appeal from state courts when it appeared that the complaining party lacked standing to contest the law's validity in the federal courts." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (citations omitted).

See, e.g., Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (dismissing appeal from state court judgment where taxpayer plaintiffs lacked any "direct and particular financial interest" in allegedly unconstitutional state law); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam) (dismissing appeal "on the ground that appellant has no standing to litigate the constitutional question which the record presents"); *Braxton County Court v. West Virginia ex rel. Tax Comm'rs*, 208 U.S. 192, 197 (1908) (same). Those cases are controlling here, and mandate denial of the Petition.

Standing, a component of the case-or-controversy requirement (U.S. CONST. art. III, § 2, cl. 1), represents an "irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a party must satisfy three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations and internal quotations omitted). The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* at 561.

Here, as the Tenth Circuit squarely held in a nearly identical case, Petitioners cannot satisfy at least two of these requirements: injury in fact and redressability. In *Day v. Bond*, 500 F.3d 1127, *reh'g and reh'g en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008), nonresident students sought to challenge a Kansas law that permitted certain unlawful aliens to qualify for in-state tuition rates, claiming, among other things, that the law was preempted by Section 1623 and violated their rights under the Equal Protection Clause. The student plaintiffs did not qualify for resident tuition under the challenged law or any other Kansas statute. *Id.* at 1131. The Tenth Circuit affirmed the dismissal of plaintiffs' claims on the ground that they lacked standing. *Id.* at 1139-40. The court reasoned that "[n]one of these Plaintiffs would be eligible to pay resident tuition" even if the law were struck down, because none of them had attended Kansas high schools for at least three years and graduated, as the law required. *Id.* at 1135. Thus, the plaintiffs could not establish either that they were injured by the statute or that any injuries would be redressed by a favorable decision. *Id.* at 1134-35. The court also held that because there is no private right of action to enforce Section 1623, the plaintiffs' "generalized interest in the Defendants' compliance with the law" was insufficient to establish standing. *Id.* at 1135-39.

Exactly like the plaintiffs in *Day*, Petitioners do not qualify for in-state tuition under Section 68130.5, and they paid exactly the same nonresident tuition that they would have paid, had that statute not been enacted. Petitioners therefore have not suffered any "direct, specific, and concrete injury" as required for Article III standing. *ASARCO Inc.*, 490 U.S. at 623; *see Daughtrey v. Carter*,

584 F.2d 1050, 1058 (D.C. Cir. 1978) (generalized interest in enforcement of immigration laws is an "abstract injury" insufficient for standing). Moreover, Petitioners forfeited their claims under Section 1623 and 42 U.S.C. § 1983 (Pet. App. 8), and a second state statute, Education Code Section 68130.7, prohibits the California courts from granting any money damages, tuition reimbursement, or other retroactive relief. *See* Pet. 7. As a result, there is no relief that a court could grant that would redress Petitioners' alleged injuries. The Petition therefore should be denied for lack of standing.

II. THERE IS NO CONFLICT OR OTHER GROUND WARRANTING CERTIORARI.

The California Supreme Court's unanimous decision below does not conflict with any decision of this Court or of any other court and does not present any important issue of federal law warranting certiorari. Rather, it involves nothing more than a straightforward application of well-settled canons of statutory interpretation, including the elementary principle—repeatedly recognized by this Court—that plain and unambiguous statutory language is controlling and cannot be negated by resort to legislative history.

A. No Other Court Has Addressed Whether Similar State Tuition Laws Are Preempted By Federal Law.

There is no conflict among the lower courts. As Petitioners acknowledge (Pet. 7 & n.5), ten other states currently have laws similar to California's that exempt certain nonresident students, including some unlawful

aliens, from paying in-state tuition.[8] However, to date no other court has addressed on their merits claims that such state tuition laws are preempted by the federal immigration statute at issue here, Section 1623, although such claims are pending before lower courts. As discussed above, in the only reported lower court decision, the Tenth Circuit affirmed the dismissal of a challenge to a nearly identical Kansas law on standing grounds.

Petitioners assert that the California Supreme Court's interpretation of Section 1623 conflicts with *dicta* from a single federal district court. Pet. 25-26. There is no such conflict.[9] The district court decision upon which Petitioners rely is entirely consistent with the California Supreme Court's decision. That case, *Equal Access Education v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004), rejected plaintiffs' argument that defendants' policy of denying college admission to unlawful aliens conflicted with federal law including Section 1623, which it held does not address the issue of alien access to post-secondary educational institutions. *Id.* at 604-07. The court suggested that the "more persuasive inference" to draw from Section 1623 is that "public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot

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8. *See* Nat'l Conference of State Legislatures, *Undocumented Student Tuition: State Action* (Apr. 2011), http://www.ncsl.org/default.aspx?tabid=12846 (last visited Apr. 15, 2011).

9. Even if there were, that would not constitute grounds for certiorari. This Court's Rules contemplate review of a decision by a state court of last resort only where it has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or *of a United States court of appeals*." Sup. Ct. R. 10(b) (emphasis added).

receive in-state tuition benefits unless out-of-state United States citizens receive this benefit." *Id.* at 606. That statement is entirely consistent with the decision below. *See* Pet. App. 18 ("Every nonresident who meets Section 68130.5's requirements—whether a United States citizen, a lawful alien, or an unlawful alien—is entitled to the nonresident tuition exemption").

Finally, even if there were any basis for review, the Court should deny certiorari until and unless a square conflict emerges in the lower courts. In addition to the unsuccessful challenge to the Kansas tuition statute discussed above, litigation has been filed challenging at least two similar state laws, those in Nebraska and Texas. Each of those cases raises the same preemption issue. *Immigration Reform Coal. of Texas v. State*, No. 2009-79110 (Harris C'ty, Tex., 281st Jud'cl Dist.); *Mannschreck v. Clare*, No. Ci10-8 (Dist. Ct., Jefferson C'ty, Neb.).[10]

B. There Is No Conflict Between The Decision Below and This Court's Precedents Regarding Implied Preemption.

Petitioners mistakenly contend that in conflict with precedents of this Court, the California Supreme Court "declined to address Petitioners' conflict preemption claims because it believed that conflict preemption could not occur when an express preemption clause did not

10. While the latter case has been dismissed, plaintiffs' counsel have announced that they intend to appeal from that dismissal or to ask the U.S. Department of Homeland Security to invalidate the Nebraska law. T. Ross, *Neb. College Tuition Rates Will Remain Low for Illegal Immigrants*, CHRISTIAN SCIENCE MONITOR (Dec. 17, 2010).

apply." Pet. 28-33. Petitioners claim that for the same reason, the court's decision is in tension with recent federal circuit decisions. *Id.* at 34-36. Both of those arguments are based on the same premise: that the California Supreme Court, having decided that Section 68130.5 is not expressly preempted by federal law, erroneously "refus[ed] to consider Petitioners' conflict preemption challenges." Pet. 28; *see also id.* at 29 (asserting court concluded "that it could skip over the conflict preemption issues in this case"); *id.* at 33 (court "opted not to review the conflict preemption challenges in this case").

Petitioners' key premise is inaccurate, and their claims of conflict therefore are meritless. The California Supreme Court did not "refuse" to consider Petitioners' conflict preemption claims; rather, it considered them and correctly rejected them on their merits.

Contrary to Petitioners' contention, the California Supreme Court did *not* "believe[] that conflict preemption could not occur when an express preemption clause did not apply," nor did it "ignore[] this Court's precedents." Pet. 29. Rather, the court correctly observed—citing one of the same decisions that Petitioners rely upon—that even if a state law is not expressly preempted by federal law, "Congress's intent to preempt 'may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.'" Pet. App. 30, quoting *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). As the court also correctly acknowledged, "[t]his presents a question of Congressional purpose." *Id.*

In determining that issue, the court did not base its ruling, as Petitioners claim, on a bare "inference" that an implied preemption challenge would be automatically foreclosed. Rather, it concluded that Sections 1621 and 1623 flatly preclude any conclusion that Congress intended impliedly to preempt Section 68130.5, for the simple reason that they expressly *authorize* states to enact such laws:

> In this case, Congress did not merely imply that matters beyond the preemptive reach of the statutes are not preempted; it said so expressly. Section 1621([d]) says that a state "may" provide public benefits for unlawful aliens if it does so in compliance with the statute's requirements. This language shows that Congress did not intend to occupy the field fully. Because section 68130.5 complies with the conditions set out in both section 1621 and section 1623, those statutes cannot impliedly preempt it.

Pet. App. 31. "In short, Congress did not impliedly prohibit what it expressly permitted." *Id.* at 32.

The California Supreme Court's ruling does not conflict with any of the authorities cited in the Petition. Unlike the instant case, none of those cases involved statutory language that affirmatively authorized states to enact legislation, subject to specified conditions. Rather, each of those cases involved the interpretation of a federal statute that included both an express preemption clause and a saving clause which provided that certain state legislation or regulation would fall outside the scope of the preemption clause. Moreover, of course, none of those cases involved the same statute as that involved

here, and issues of statutory interpretation necessarily are highly dependent on the language of the particular statute involved.[11]

Thus, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), upon which Petitioners primarily rely, the Court found that even though a state tort suit fell outside the scope of an express preemption clause in a federal automotive safety statute by virtue of a saving clause in the same statute, it was nevertheless impliedly preempted because it actually conflicted with the objective of that statute and its implementing regulations. The Court held that the savings clause did not foreclose or limit the operation of ordinary conflict preemption principles, reasoning that although state-law tort actions were not expressly preempted, "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." *Id.* at 869. In contrast, this Court recently held that another similar state tort action that implicated the very same federal statute was *not* preempted because allowing it to proceed would not conflict with a significant objective of the federal regulation. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

In sharp contrast to *Geier* and other similar cases, the statute involved here directly regulates what the states may and may not do. Accordingly, there is no issue regarding the interplay between an express

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11. For that reason, Petitioners' reliance on lower court decisions involving preemption issues arising under an unrelated immigration statute, 8 U.S.C. § 1324a(h)(2), is misplaced. Pet. 34-35.

preemption clause and a savings clause. Rather, the California Supreme Court's resolution of the implied preemption question turned on its construction of the straightforward statutory language itself. By definition, state legislation such as Section 68130.5 that is authorized by Section 1621 and complies with Section 1623 cannot conflict with a significant objective of federal law, since Congress affirmatively authorized the States to enact it. Accordingly, the decision below does not conflict with *Geier* or other cases construing statutes lacking such an express provision.

C. Neither Failed Legislation Nor Speculation Regarding Future Legislation Presents Any Basis for Certiorari.

Petitioners also contend that certiorari is warranted "to prevent California and other states from taking additional steps" in purported violation of Section 1623. Pet. 26. In particular, Petitioners point to two bills passed by the California Legislature during 2010 that, they contend, would have unlawfully expanded the scope of postsecondary educational benefits available to unlawful aliens. *Id.* at 26-27. As Petitioners acknowledge, however, both bills "died without the signature" of the State's Governor. *Id.*

To state the obvious, this Court does not grant certiorari to "prevent" states from enacting legislation that a party contends *might* violate federal law, nor to decide the validity of proposed but failed legislation. "The Constitution permits this Court to decide legal questions only in the context of actual 'Cases' or 'Controversies.' U. S. Const., Art. III, §2." *Alvarez v. Smith*, 130 S. Ct. 576,

580 (2009). That fundamental jurisdictional prerequisite cannot be met by a litigant's speculation regarding legislation that *might* be enacted in the future. "A federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citations omitted); *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

Petitioners and their *amici* also contend because "unsuccessful efforts to repeal § 1623 have been mounted in every session of Congress since 2001," that is somehow a reason for this Court to grant review. Pet. 7-8 & n.6; Washington Legal Foundation ("WLF") Br. 15. But this Court repeatedly has warned that "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . . .'" *United States v. Craft*, 535 U.S. 274, 287 (2002) (citations and internal quotations omitted).

That caution is particularly appropriate here. The failed legislation referred to, the DREAM Act, would have allowed certain unlawful aliens to apply for conditional legal status and to become permanent legal residents after completing two years of college attendance or military service and meeting other requirements. That earlier versions of that proposed legislation—but *not* the version most recently rejected by Congress[12]—would have

12. S. 3992; H.R. 5281 (111th Cong., 2d Sess.).

repealed Section 1623, among numerous other objectives, provides no basis to conclude that this Court's review is required.

D. Petitioners' Position As To The Preemptive Effect Of Section 1623 Is Unsupported By The Federal Agency Charged With Enforcing That Law.

Finally, to Respondents' knowledge, no federal agency has taken any action or issued any authoritative guidance supporting Petitioners' position. That omission is significant because one of Petitioners' *amici curiae* years ago requested the U.S. Department of Homeland Security, which is primarily responsible for enforcing the nation's immigration laws (8 U.S.C. § 1103(a)(1)), to take action against other states with similar tuition legislation.[13] But as that *amicus* concedes, the federal government has not taken such enforcement action or even issued any regulations interpreting Section 1623. WLF Br. 2, 13; *see also* Pet. App. 111-12 (noting lack of any federal regulatory opinion regarding validity of state tuition laws).

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13. In 2005, *amicus curiae* Washington Legal Foundation filed formal complaints with the Department of Homeland Security arguing that the similar New York and Texas tuition laws violated Section 1623, and calling upon DHS to take enforcement action against those states. Washington Legal Foundation, *WLF Files Civil Rights Complaint Against State of Texas Regarding Benefits for Illegal Aliens* (Aug. 9, 2005), http://www.wlf.org/upload/080905RS.pdf; *WLF Files Civil Rights Complaint Against State of New York Regarding Benefits for Illegal Aliens* (Sept. 7, 2005), http://www.wlf.org/upload/090705RS.pdf.

If, as Petitioners' *amici* contend, there were truly "widespread confusion" regarding the meaning of Section 1623 (*id.* at 9),[14] surely the Executive Branch agencies responsible for the enforcement of the federal immigration laws would have acted in the fifteen years since that statute was enacted in 1996, over the course of several different Government administrations, to clear up such confusion. In the absence of such regulatory guidance, this Court should not reach out itself to decide an issue of statutory interpretation that, if there truly were any compelling need to do so, readily could be addressed either by Congressional amendment or by regulatory action.

III. THE CALIFORNIA SUPREME COURT CORRECTLY RESOLVED BOTH ISSUES.

The California Supreme Court correctly resolved Petitioners' express and implied preemption challenges to Education Code Section 68130.5. In particular, that court's interpretation of Section 1623 is entirely consistent with the plain and unambiguous language of that federal statute. In contrast, Petitioners urge an interpretation that is irreconcilable with the plain statutory text. Likewise, the court properly rejected Petitioners' implied preemption claims.

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14. *Amici* do not supply any concrete examples of such "confusion," but instead point out only that different states have enacted varying laws on the subject. WLF Br. 6-7, 11-15. Under our federal system, such variation is entirely appropriate. Indeed, it is precisely what Congress had in mind when it enacted Section 1621(d), which expressly authorizes states to enact legislation affirmatively making unlawful aliens eligible for certain benefits, but neither mandates nor prohibits such legislation. That some states have chosen to enact such legislation, while others have not, hardly establishes "confusion" warranting review by this Court.

A. The Court Correctly Construed Section 1623.

Petitioners assert that Section 1623 lends itself to two possible interpretations, only one of which is "plausible." Pet. 16. They contend that the California Supreme Court adopted the wrong interpretation, one that is unsupported by its legislative history. *Id.* at 17. However, Petitioners' argument is inconsistent with elementary principles of statutory interpretation long recognized by this Court.

1. The Court's Interpretation Is Compelled By The Plain Statutory Language.

As Petitioners acknowledge (Pet. 10), the "central issue" presented by their express preemption claim is whether Section 68130.5 makes unlawful aliens eligible for a postsecondary education benefit "on the basis of residence within a State" in violation of Section 1623. In addressing that issue, Petitioners proceed immediately to an examination of the statute's legislative history, without pausing to examine its plain language. Pet. 18-22. Petitioners' approach puts the cart of legislative history before the horse of statutory interpretation.[15]

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15. Petitioners insist that the statute's legislative history, rather than its text, is the "authoritative" source for determining Congressional intent. Pet. 20 n.10. This Court has firmly rejected that precise assertion:

> As we have repeatedly held, *the authoritative statement is the statutory text, not the legislative history* or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (emphasis added).

"We begin, as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 (2011) (citation omitted). "We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.' When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006) (citations omitted).

Here, as Petitioners explicitly concede, Section 1623 on it face does not constitute an absolute prohibition against states offering in-state tuition rates to unlawful aliens. Pet. 24 n.11 ("Why Congress did not simply enact a flat prohibition is unclear"). Rather, Congress enacted a *qualified* and *conditional* prohibition: it stated that an unlawful alien "shall not be eligible *on the basis of residence within a State* . . . for any postsecondary education benefit *unless* a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623(a) (emphasis added).

As the California Supreme Court correctly reasoned, this language, on its face, requires a reviewing court to determine whether Section 68130.5 makes unlawful aliens eligible for the benefit of in-state tuition "on the basis of residence within a State." The court correctly concluded that it does not. Nowhere on its face does the state statute make any reference to state residence as a criterion for eligibility. Nor are the statutory criteria "proxies" or "surrogates" for residence. To the contrary, as the court correctly concluded, those criteria can be and are met by

many students who are *not* residents; thus, the exemption "cannot be deemed to be based on residence for the simple reason that many *nonresidents* may qualify for it." Pet. App. 18. In asserting that the statutory criterion requiring attendance at a California high school "effectively equates to 'residence,'" (Pet. 23-24), Petitioners ignore the court's enumeration of several categories of nonresident students who can and do qualify for the statutory exemption. Those uncontested facts are fatal to Petitioners' challenge to the court's interpretation, which is the only reading consistent with the statutory text.

2. Petitioners' Interpretation Is Inconsistent With The Statutory Text.

Petitioners inconsistently contend, relying almost exclusively on the statute's legislative history, that Section 1623 should be read as an absolute prohibition on States allowing unlawful aliens to pay in-state tuition rates at public colleges and universities. *See* Pet. 17 ("Congress intended to prevent states from providing resident tuition rates to illegal aliens"); *id.* at 20-22 ("Plainly, Congress intended to deny illegal aliens in-state tuition benefits at state colleges and universities"). As the California Supreme Court correctly concluded, however, that reading cannot be squared with the statute's plain language and structure.

As noted, Section 1623 as drafted is a *conditional* and *qualified* prohibition, not an absolute one.[16] In contrast, Petitioners would read the statute as a broad,

16. Petitioners' *amici* concede as much, admitting that that "the phrase 'on the basis of residence' somewhat narrows the scope of § 1623." WLF Br. 23.

unconditional prohibition on eligibility, *without regard to* residence. In particular, Petitioners contend that "the phrase 'on the basis of residence within a state' defines the benefit, not the criterion by which the benefit is rewarded." Pet. 17. Petitioners assert that Congress could have employed "the shorter phrase 'eligible for resident tuition rates,'" but instead "chose a phrase that conveyed the same meaning, but was more encompassing." *Id.* "In other words," Petitioners suggest, "8 U.S.C. § 1623 refers to 'residence' in defining the *benefit* because Congress was concerned about states offering illegal aliens a particular benefit – *resident* tuition rates or the functional equivalent thereof." *Id.*

Contrary to Petitioners' reading, Section 1623 focuses on an unlawful alien's *eligibility* for specified benefits. Its opening language directs that "an alien who is not lawfully present in the United States *shall not be eligible*" for certain benefits. Immediately following the word "eligible," Congress specified the "basis" on which such eligibility could not be granted: "on the basis of residence." Only after describing the eligibility limitations and after the word "for" did Congress specify the *benefit* it sought to regulate: "any postsecondary education benefit." Thus, the plain language of Section 1623 limits the bases on which states can extend eligibility, not the benefits they can grant. The statute's title supports the same conclusion: "*Limitation on eligibility* for preferential treatment of aliens not lawfully present *on basis of residence* for higher education benefits." 8 U.S.C. § 1623 (emphasis added).[17]

17. The title of a statute and the heading of a section can aid in resolving doubts about the meaning of a statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

Petitioners' strained interpretation is at odds with this straightforward and grammatically consistent reading of the statute. If Congress had meant the phrase "on the basis of residence within a State" to modify the term "postsecondary education benefit," it would have placed it immediately after that term, not after the term "eligible." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). Instead, Petitioners would construe the statute as if it read in pertinent part,

> [A]n alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit granted on the basis of residence within a State . . . .

But this Court recently rejected a statutory interpretation that suffered from the same "patent flaw" that it was "disconnected" from the text of the statute. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011). There, as here, "the only way to arrive at [that interpretation] is by taking a red pen to the statute—'cutting out' some words' and 'pasting in others' until little of the actual provision remains." *Id.*

Petitioners' interpretation not only is inconsistent with the plain statutory text, it would render the phrase "on the basis of residence within a State" meaningless, in violation of the familiar canon that prohibits construing statutory language as mere surplusage. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'") (citations omitted); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448-49 (2005) (rejecting arguments that failed

to offer "any plausible alternative interpretation" of clause in preemption provision "that would give that phrase meaning"). It also would give no real meaning to the final, conditional clause of the statute, which Petitioners claim was not truly intended as a condition, but rather as a penalty that would "make it practically impossible for states to grant in-state tuition to illegal aliens." Pet. 20. *See Milner*, 131 S. Ct. at 1269 (criticizing Government's construction for "stripping the word 'personnel' of any real meaning").

3. The Statute's Sparse Legislative History Cannot Negate Its Plain Language.

As support for their proffered interpretation, Petitioners rest heavily on the statute's legislative history. Pet. 20-22. However, the California Supreme Court correctly concluded the legislative history is insufficient to overcome the statute's plain language.

The legislative history consists in its entirety of (i) a single sentence in a conference committee report on predecessor legislation; (ii) a passage in the Congressional Record reflecting remarks by a single Congressman, Rep. Cox; and (iii) two nearly identical such remarks by a second legislator, Senator Simpson. Pet. 20-22; Pet. App. 22-23. However, in sharp contrast to the conditional and qualified language of Section 1623, those brief snippets of legislative history seemingly portray the statute as an absolute, unqualified ban. They are particularly unhelpful because none of them mentions or attributes any meaning whatever to *either* of the two critical qualifying phrases: "on the basis of residence within a State," or the "unless"

clause that ends the statute. As such, they provide no useful guidance as to Congress' intent in enacting those provisions.

For these reasons, the California Supreme Court correctly concluded that the legislative history "does not reliably show that Congress intended to prohibit states entirely from exempting unlawful aliens from paying nonresident tuition." Pet. App. 22. Thus, the court correctly observed that the one-sentence summary in the conference committee report "oversimplifies more nuanced statutory language," and "cannot change the circumstance that the actual prohibition is not absolute, but qualified." *Id.* at 22, 23. *See, e.g., Shannon v. United States*, 512 U.S. 573, 583 (1994) ("We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"); *see also S&E Contractors, Inc. v. United States*, 406 U.S. 1, 14 n.9 (1972) ("In construing laws we have been extremely wary . . . of debates on the floor of Congress *save for precise analyses of statutory phrases* by the sponsors of the proposed laws") (citations omitted and emphasis added).

Likewise, the court appropriately found that floor statements by two individual legislators "carry little weight in interpreting the intent of the legislative body as a whole." *Id.* at 23. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text").

The California Supreme Court's refusal to accord dispositive significance to the legislative history, in contradiction to the plain statutory text, is entirely consistent with this Court's precedents. As the Court recently explained in rejecting the Government's similarly "text-light" approach to a statute,

> Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.

Milner, 131 S. Ct. at 1266. That "fundamental point" (*id.*) is equally persuasive here.

B. The Court Properly Rejected Petitioners' Implied Preemption Claims.

Although Petitioners base the Petition on the erroneous claim that the California Supreme Court "refused" to address their implied preemption arguments, Petitioners do not discuss those claims in detail. Instead, they summarize them in a single sentence, asserting that "Congress's statement of national immigration policy in [the PRWORA], its unmistakable intent behind 8 U.S.C. § 1623, as well as its prohibition of encouraging illegal aliens to remain in the United States, demonstrate a clear congressional objective" that Section 68130.5 "defeats." Pet. 33 (citations omitted). The California Supreme Court correctly concluded that those claims are baseless.

Section 1601(6) of the PRWORA is a general statement of Congressional policy. The operative provisions of that statute include Section 1621(d), by which Congress expressly *authorized* the States to provide public benefits to unlawful aliens. Obviously, a state law that complies with the express terms of Section 1621 cannot be impliedly preempted by a general statement of policy in the same statutory scheme. The same reasoning is dispositive of Petitioners' other claim, which is based on a federal statute that makes it a crime to knowingly or recklessly "encourage[]" or "induce[]" aliens to enter or remain in this country illegally. 8 U.S.C. § 1324(a)(1)(A)(iv). As the California Supreme Court correctly observed, "Congress did not impliedly prohibit what it expressly permitted." Pet. App. 32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ETHAN P. SCHULMAN
Counsel of Record
TRINA D. MCALISTER
CROWELL & MORING LLP
275 Battery Street,
23rd Fl.
San Francisco, CA 94111
(415) 986-2800
eschulman@crowell.com

CHARLES F. ROBINSON
KAREN J. PETRULAKIS
MARGARET WU
UNIVERSITY OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
1111 Franklin Street,
8th Fl.
Oakland, CA 94607-5200
(510) 987-9800

Counsel for Respondents The Regents of the University of California and Mark G. Yudof

CHRISTINE HELWICK
ANDREA M. GUNN
CALIFORNIA STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
401 Golden Shore,
4th Floor
Long Beach, CA 90802-4210
(562) 951-4500

Counsel for Respondents The Board of Trustees of the California State University and Charles B. Reed

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In The
Supreme Court of the United States

ROBERT MARTINEZ, ET AL.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITIONERS' REPLY BRIEF

KRIS W. KOBACH
Counsel of Record
GARRETT R. ROE
MICHAEL M. HETHMON
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
kkobach@gmail.com

MICHAEL BRADY
SUSAN H. HANDELMAN
ROPERS, MAJESKI, KOHN, & BENTLEY
1001 Marshall St., Suite 300
Redwood City, CA 94063

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. Petitioners Possess Article III Standing.

Petitioners are U.S. citizen students who attend or have attended public colleges or universities in California and have been required by Respondents to pay higher, out-of-state tuition rates while illegal aliens have been afforded in-state tuition rates, in violation of 8 U.S.C. §1623. Petitioners' requested relief includes: (1) an injunction prohibiting Respondents from continuing to unlawfully charge Petitioners a higher tuition rate than that charged to certain illegal aliens, (2) reimbursement of the unlawful excess tuition they have been required to pay by Respondents, and (3) a declaration that Cal. Ed. Code §68130.5 is preempted by federal law.

Respondents argue that while Petitioners possess standing under California standing doctrine, they lack Article III standing. Respondents claim that Petitioners are not injured by the fact that illegal aliens pay lower tuition rates, and that any injury is not redressable because "[i]f the state law is invalidated . . . petitioners' tuition will remain unchanged." California Community Colleges (CCC) Br. 11; Regents Br. 18. Respondents fail to correctly describe the injuries at issue and fail to assess all of the forms of relief sought.

A. Petitioners Suffer Injury to a Legal Interest.

The primary injury-in-fact suffered by Petitioners is *an injury to a legal interest* – the legal interest created by 8 U.S.C. §1623. Specifically, it is the legal interest in receiving "any postsecondary education benefit" provided by the state's public universities and community colleges to "an alien who is not lawfully present in the United States" in "no less an amount, duration and scope." *Id.*

It is settled law that injury to a legal interest created by a federal statute is sufficient to confer Article III standing on a plaintiff: " . . . Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (citations omitted). This Court has repeatedly recognized the power of Congress to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (*citing Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972), and *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968)).

The injury to the legal interest created by §1623 occurs irrespective of financial injury. Whenever an

illegal alien is offered a postsecondary education benefit and that benefit is denied to a U.S. citizen student at the state's universities, based on "whether the citizen . . . is such a resident," 8 U.S.C. §1623, the legal interest created by the federal statute has been invaded.

This injury is redressable by invalidation of the offending state statute. It matters not whether the U.S. citizen students pay in-state or out-of-state tuition rates after the invalidation of the state statute. The invasion of their legal interest under §1623 ends when the unequal treatment ends. Where disparate treatment is the cause of the injury, "the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citations and footnotes omitted); *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2333 (2010); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817-18 (1989).

B. Petitioners Seek Reimbursement.

Petitioners also assert a financial injury in the form of the excess tuition charged to them, over and above the tuition charged to illegal aliens at the same institutions. Because the proceedings below never passed the demurrer stage, no court considered what forms of relief should be granted. If Petitioners prevail on their §1623 express preemption claim or their

conflict preemption claims, they will seek injunctive relief ordering Respondents to reimburse Petitioners for the excess tuition they paid.

Regents Respondents present the novel theory that Cal. Ed. Code §68130.7 – a law enacted shortly after §68130.5 to immunize California from paying damages for its violation of 8 U.S.C. §1623 – actually permits the State to violate federal law with impunity. Regents. Br. 19. Therefore, Respondents reason, since the State has declared through legislative fiat that it shall not be liable, reimbursement can never occur; thus redressability (and standing) is denied. *Id.* On its face, this argument is meritless. *See Haywood v. Drown*, 129 S.Ct. 2108, 2114 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.").[1]

C. Petitioners Do Not Present a Generalized Grievance.

Respondents also make the unsupported assertion that Petitioners present a generalized grievance "that California is not in compliance with federal law." CCC Resp. 7; Regents Resp. 16. This assertion is

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[1] Even if §68130.7 were a valid exercise of State authority, it would not negate the redressability of the denial of equal treatment guaranteed by §1623. Ending the benefit for illegal aliens would still redress the injury.

incorrect. Petitioners are U.S. citizen students who have personally been denied the in-state tuition benefits given to illegal aliens at the same state universities – a legal interest conferred on them specifically by Congress under §1623. The general public suffers no such injury. This is far from a "generalized grievance" that is "plainly undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (*quoting Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

II. Petitioners Bring a Preemption Claim, and Therefore Do Not Need a Separate Private Right of Action.

Respondents argue that because Petitioners waived their argument that §1623 creates a private right of action, Petitioners may not proceed in this Court. Regents Br. 18; CCC Br. 13. However, Petitioners are asserting that §1623 *preempts* §68130.5, not that they have a private right of action to *enforce* the substantive provisions of the law.

This Court routinely reviews preemption claims without first determining whether the party has a private right of action to bring the case. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 625 (1973).

All of the circuits that have considered the issue agree that a party does not need a private right of action to bring a preemption claim. "A party may

bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2006). "In other words, a 'claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.'" *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003) (*quoting Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1007 (2d Cir. 1997); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 579-81 (9th Cir. 2007).

Additionally, Respondents conceded at the trial court that Petitioners do not need a private right of action to bring a preemption claim, App. 120, and did not re-raise the issue in the California Supreme Court. Having conceded the issue and waived it below, Respondents cannot now argue that Petitioners need a private right of action to bring a preemption claim. *See The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 593 (2008).

Regents Respondents also misrepresent the holding of *Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 2987 (2008), a standing case concerning Kansas's law granting in-state tuition rates to illegal aliens. Respondents claim that

"'none of these [*Day*] Plaintiffs would be eligible to pay resident tuition' even if the law were struck down," and the same standing conclusion applies in this case. Regents Br. 18 (*quoting Day*, 500 F.3d at 1135). However, that holding in *Day* applied to the plaintiffs' Equal Protection Clause claim, not to their preemption claims. *See id.* at 1132-35.[2]

More importantly, reliance on the *Day* decision is problematic at best because the Tenth Circuit erred by intermixing standing and private right of action doctrines. The Tenth Circuit incorrectly made the former dependent upon the latter. "The standing question *is* whether §1623 creates a private right of action." *Day*, 500 F.3d at 1138 (emphasis added). The *Day* court then proceeded to evaluate whether §1623 conferred a private right of action on the plaintiffs, rather than whether they had standing to bring their preemption challenge under normal standing doctrine. *Id.* at 1138-39. This Court has specifically cautioned lower courts against making this error. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("The Court of Appeals appeared to confuse the question of whether petitioner had standing with the

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[2] The Tenth Circuit's holding that a plaintiff lacks standing under the Equal Protection Clause when he would not otherwise qualify for the benefit conflicts with this Court's precedents holding that the remedy could simply be an end to the unequal treatment. *Heckler*, 465 U.S. at 739-40; *Levin*, 130 S.Ct. at 2333.

question of whether she had asserted a proper cause of action.").

III. Confusion Persists Among the States.

Prior to the Petition in this case, eleven states had granted in-state tuition rates to illegal aliens, in violation of §1623. Pet. 7 n.5.[3] Respondents brush aside the continuing confusion in the states as "speculation regarding future legislation." Regents Br. 25. However, it is far from speculative. In the weeks since the Petition was filed, the legislature of a twelfth state, Maryland, has passed an act affording illegal aliens in-state tuition in violation of §1623.[4]

At the same time that twelve states have defied §1623, numerous other states have rejected proposals to grant in-state tuition benefits to illegal aliens because they correctly surmised that doing so would violate federal law. *See* Ariz. Rev. Stat. 15-1803(B) ("In accordance with [§1623], a person . . . who is without lawful immigration status is not entitled to classification as an in-state student . . . "); *see also* WLF Amicus Br. 12-13. State attorneys general also have found that providing in-state tuition to illegal

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[3] Petitioners omitted the Wisconsin statute, Wis. Stat. §36.27(cr), in their Petition.

[4] Maryland SB 167. *See* Sabrina Tavernise, *Maryland: Bill Giving Tuition Breaks to Immigrants is Sent to Governor*, NY TIMES, April 13, p. A19. At this time, the governor has not yet signed it.

aliens would violate §1623. *See, e.g.*, Va. Atty. Gen'l Op. No. 06-018 (2006); *see also* WLF Amicus Br. 13.

The writ should be granted to give guidance to the state legislatures and officials that have disputed the meaning of §1623 for more than a decade, to prevent additional states from violating federal law, and to avoid needless litigation that will otherwise continue.

IV. The Lack of a Federal Regulation Reinforces Petitioners' Argument.

Regents Respondents also argue that because the Department of Homeland Security ("DHS") has not promulgated regulations interpreting §1623, certiorari is not warranted. Regents Br. 27-28. Respondents' novel theory seems to be that if there were any confusion about the meaning of the statute, then the DHS would have promulgated regulations to clarify it. *See id.*

What Respondents fail to recognize is that *the relevant agencies do not even agree* on which one of them has the authority to interpret §1623. It is a one-sentence statute that does not mention which agency is responsible for enforcing it. There are three possibilities – DHS, the Department of Justice, or the Department of Education. Respondents declare that it obviously must be DHS's job, since DHS is charged with enforcing immigration laws. Regents Br. 27. However, that is not the Justice Department's view. Recently, both the Justice Department and DHS were

asked by litigants in Nebraska to take action to enforce §1623 in their state.[5] The Department of Justice responded on April 14, 2011, *not by referring the matter to DHS, but by referring it to the Department of Education.*[6] DHS did not even respond. Similarly, as Respondents concede, DHS has not taken any action since being asked to do so by Amicus WLF in 2005. Regents Br. 27 n.13. This uncertainty among the executive branch departments regarding whose responsibility it is explains why no department has stepped forward to address the confusion among the states. For that reason, review by this Court is especially necessary.

V. The California Supreme Court Improperly Concluded that an Express Preemption Savings Clause Also Resolves any Conflict Preemption Claims.

This Court made clear in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000), that where a case presents both express preemption and implied conflict preemption challenges, and the express preemption challenge fails, that conclusion does not mean that implied conflict preemption has not occurred. A complete conflict preemption analysis must still be

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[5] Letter to Department of Justice, February 7, 2011; Letter to Department of Homeland Security, February 7, 2011 *available at* http://www.irli.org/node/35.

[6] Letter from Department of Justice, April 14, 2011 *available at* http://www.irli.org/node/35.

conducted. *See also Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). This Court recently reiterated this *Geier* principle. *AT&T Mobility LLC v. Concepcion*, Slip Op. 9 (April 27, 2011).

Rather than follow this Court's *Geier* line of precedents, the California Supreme Court ignored it entirely and adopted a pre-*Geier* view that if a statute falls within an express preemption savings clause, then implied preemption cannot occur. Pet. 29-33. The court devoted four paragraphs to explaining why this must be so.[7] App. 30-32. The court concluded: "In short, Congress did not impliedly prohibit what it expressly permitted. Section 68130.5 is not impliedly preempted." App. 32.

Respondents attempt in vain to conceal the court's mistake in this regard. Regents Respondents simply declare without elaboration that "the court properly rejected Petitioners' implied preemption claims." Regents Br. 28. However, they misunderstand the problem. The problem is not that the court failed to reject the implied preemption claims. The problem is that the court rejected them *for an impermissible reason*: an implied preemption claim cannot be rejected simply because the statute in question is saved

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[7] While the court's reasoning may apply to implied field preemption, *see* App. 31-32, it does not apply to implied conflict preemption – a distinction Respondents miss.

by an express preemption savings clause. *Geier*, 529 U.S. at 869.

CCC Respondents understand the problem. However, they respond by ripping fragments from the court's decision and stitching them back together in the form of an implied preemption analysis that the court never conducted. CCC Resp. 21-24. They admit that they are doing exactly that: "Although the California Supreme Court did not explicitly label this discussion as the impossibility prong of implied preemption, it effectively disposes of that analysis." *Id.*, 23 n.8 (citing App. 18-19). Respondents grossly mischaracterize the court's decision. Nothing on pages 18-19 comes close to addressing Petitioners' conflict preemption arguments.

One of Petitioners' principal conflict preemption claims before the California Supreme Court was that §68130.5 suffers from impossibility preemption. This is because an illegal alien student must remain unlawfully present at a California university in order to take advantage of the law's valuable financial subsidy. It is therefore impossible to comply with federal law while receiving the benefit of §68130.5. Respondents' attempt to fabricate a response to this impossibility preemption argument from the court's out-of-context statements does not make sense. Respondents say that "the court also addressed how it was possible *for the State law to comply with the federal law. . . .*" CCC Resp. 22 (emphasis added). That is correct. But that has nothing to do with *whether an illegal alien can comply with federal law*

while receiving the benefit of in-state tuition rates. The court was addressing an express preemption claim under §1623, not an impossibility-of-compliance conflict preemption claim.

Petitioners' second conflict preemption claim concerned the federal crime of "encourage[ing]" or "induc[ing]" an illegal alien to "reside in the United States." 8 U.S.C. §1324(a)(1)(A)(iv). When Respondents encourage illegal aliens to seek admission by offering them in-state tuition rates, they severely undermine the enforcement of this federal law. The California Supreme Court said nothing in response to this conflict preemption claim. So too with Petitioners' claims that §68130.5 conflicts with the classifications of federal immigration law by inventing its own classifications. Instead, the court dismissed all of the implied preemption claims with the sweeping observation that "Congress did not impliedly prohibit what it expressly permitted." App. 32.

Finally, Regents Respondents oddly assert that "[t]he California Supreme Court's ruling does not conflict with any of the authorities cited in the Petition" because "none of those cases involved statutory language that affirmatively authorized states to enact legislation, subject to specified conditions. . . ." Rather, each statute contained a savings clause "provid[ing] that certain state legislation or regulation would fall outside the scope of the preemption clause." Regents Br. 23. There is no functional difference between the two. In §§1621(d) and 1623, as well as in the preemption savings clauses analyzed by this

Court, *see* Pet. 29-33, certain state activity is expressly preempted while other state activity is saved from preemption. The analysis is the same. *See Geier*, 529 U.S. at 869. Granting the writ will prevent lower courts from making this error and reviving the pre-*Geier* confusion.

CONCLUSION

For the foregoing reasons, certiorari is warranted.

Respectfully submitted,

KRIS W. KOBACH
Counsel of Record
GARRETT R. ROE
MICHAEL M. HETHMON
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
kkobach@gmail.com

MICHAEL BRADY
SUSAN H. HANDELMAN
ROPERS, MAJESKI, KOHN, & BENTLEY
1001 Marshall St., Suite 300
Redwood City, CA 94063

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